

N^o. 238.

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JAMES H. MCKENNEY,
CLERK.

Brief of Atty. Gen.^l (Boyd)
for U. S.

Filed Mar. 25, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

EVERETT JOLLY, PLAINTIFF	} No. 238.
in error,	
v.	
THE UNITED STATES.	

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

JAS. E. BOYD,
Assistant Attorney-General.

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STATEMENT.

The plaintiff in error, Everett Jolly, was tried and convicted at the February term, 1896, of the district court for the district of Kentucky, and sentenced to imprisonment in the penitentiary for a term of two years.

The indictment in this case contained five counts and is as follows:

In the district court of the United States for the 6th circuit and district of Kentucky, Owensborough division.

Pleas and proceedings before the Honorable John W. Barr, judge of the district court of the United States for the district of Kentucky.

UNITED STATES	} Indictment.
<i>vs.</i>	
EVERETT JOLLY.	

Be it remembered that at a term of the district court of the United States for the district of Kentucky, Owensboro division, begun and held at the public building, in the city of Owensboro, for the regular June term, 1895, Hon. John W. Barr presiding, on the 4th day of June, 1895 (the second day of said term), the grand jury returned into court the following indictment, to wit:

UNITED STATES OF AMERICA,

District of Kentucky, set.:

In the district court of the United States for the sixth judicial circuit and district of Kentucky, held at Owensborough, Kentucky, June term, in the year of our Lord eighteen hundred and ninety-five.

First count.—The grand jurors of the United States of America, impaneled and sworn and charged to inquire in and for the district of Kentucky, on their oath present that Everett Jolly, late of the district aforesaid, on the 25 day of April, in the year of our Lord eighteen hundred and ninety-four,

in the district aforesaid, in the county of Breckinridge, State of Kentucky, and district aforesaid, did then and there feloniously steal, take, and carry away from a building then and there used as a post-office building of the United States of America, at Hardinsburg, in the county, State, and district aforesaid, postage stamps of the United States of America amounting to one hundred and sixty-three and 12/100 dollars, said stamps being of the denomination—2,683 one-cent, 2,400 two-cent, 191 four-cent, 183 five-cent, and 670 ten-cent stamps, 100 one-cent postage-due stamps, and 175 two-cent postage-due stamps; but a more particular description of said stamps is to the grand jurors unknown, but that they were then and there of the value of one hundred and sixty-three and 12/100 dollars, lawful money of the United States of America, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. Sec. 5456.

Second count.—And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Everett Jolly, late of the district aforesaid, on the twenty-fifth day of April, in the year of our Lord eighteen hundred and ninety-four, in the district aforesaid, in the county of Breckinridge, State of Kentucky and district aforesaid, did then and there feloniously steal, take, and carry away postage stamps of the United States of America amounting to and of the value of one hundred and sixty-three and 12/100 dollars, lawful money of the United States of America, being of the denomination of 2,683 one-cent, 2,400 two-cent, 191 four-cent, 183 five-cent, and 670 ten-cent stamps; 100 one-cent postage-due stamps, 175 two-cent postage-due stamps, but a more particular description of said stamps is

to the grand jurors unknown; said stamps were then and there feloniously stolen, taken, and carried away by the said Everett Jolly from the possession of Thomas McClure, who was then and there a postmaster of the United States of America of the post-office at Hardinsburg, in Breckinridge County, State of Kentucky and district aforesaid, and as such postmaster then and there had said stamps in his possession when so taken, and the said stamps so stolen, taken, and carried away being then and there the personal property of the United States of America, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. Sec. 5456.

Third count.—And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Everett Jolly, late of the district aforesaid, on the twenty-fifth day of April, in the year of our Lord eighteen hundred and ninety-four, in the district aforesaid, in the county of Breckinridge, State of Kentucky, and district aforesaid, did then and there feloniously steal, take, and carry away from a building then and there used as a post-office building of the United States of America, at Hardinsburg, in the county, State, and district aforesaid, postage stamps of the United States of America amounting to one hundred and sixty-three and 12/100 dollars, said stamps being of the denomination of 2,683 one-cent, 2,400 two-cent, 191 four-cent, 183 five-cent, and 670 ten-cent stamps, 100 one-cent postage-due stamps, 175 two-cent postage-due stamps; but a more particular description of said stamps is to the grand jury unknown; which said stamps were then and there personal property of and belonging to the Post-Office Department of the United States of America, and were then and there of the value of one hundred and sixty-three and 12/100 dollars, lawful

money of the United States of America, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. Sec. 5476.

Fourth count.—And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Everett Jolly, late of the district aforesaid, on the twenty-fifth day of April, in the year of our Lord eighteen hundred and ninety-four, in the district aforesaid, in the county of Breckinridge, State of Kentucky and district aforesaid, did then and there feloniously steal, take, and carry away postage stamps of the United States of America, amounting to and of the value of one hundred and sixty-three and 12/100 dollars, lawful money of the United States of America, being of the denominations of 2,683 one-cent stamps, 2,400 two-cent stamps, 191 four-cent stamps, 183 five-cent stamps, 670 ten-cent stamps, 100 one-cent postage-due stamps, and 175 two-cent postage-due stamps, but a more particular description of the said stamps is to the grand jurors unknown; said stamps were then and there feloniously stolen, taken, and carried away by the said Everett Jolly from the possession of Thomas McClure, who was then and there a postmaster of the United States of America of the post-office at Hardinsburg, in Breckinridge County, State of Kentucky and district aforesaid; and as such postmaster then and there had said stamps in his possession when so stolen, taken, and carried away, and said stamps so stolen, taken, and carried away were then and there personal property of and belonging to the Post-Office Department of the United States of America, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. Sec. 5475.

Fifth count.—And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Everett Jolly, late of the district aforesaid, on the twenty-fifth day of April, in the year of our Lord eighteen hundred and ninety-four, in the district aforesaid, in the county of Breckinridge, State of Kentucky and district aforesaid, did then and there have and retain in his possession, with the intent to convert to his own use and gain, postage stamps of the United States of America, belonging to the United States of America, amounting to one hundred and sixty-three and 12/100 dollars, said stamps being of the denominations of 2,683 one-cent stamps, 2,400 two-cent stamps, 191 four-cent stamps, 183 five-cent stamps, 670 ten-cent stamps, 100 one-cent postage-due stamps, 175 two-cent postage-due stamps, but a more particular description of said stamps is to the grand jurors unknown; said stamps being then and there of the value of one hundred and sixty-three and 12/100 dollars, lawful money of the United States of America, and which said stamps had been theretofore stolen from the United States of America by some other person to the grand jurors unknown; and the said Everett Jolly did then and there well know that the said stamps had been stolen as aforesaid, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

A demurrer was filed by Jolly's counsel as to the first, second, third, fourth, and fifth counts of the indictment and to each one of said counts, because the facts charged in said counts and each of them constitute no offense against the United States. (Rec., p. 4.) The demurrer was sustained by the court as to the third and fourth counts and overruled as to the first, second, and fifth counts

(Rec., p. 5), and the trial was had upon the first, second, and fifth counts of the indictment. The verdict of the jury was as follows (Rec., p. 7):

We, the jury, find the defendant guilty as charged in the first and second counts.

The draftsman of the indictment appears to have had in mind section 5456, Revised Statutes, and to have drafted counts one and two with reference to said section, which reads:

SEC. 5456. Every person who robs another of any kind or description of personal property belonging to the United States, or feloniously takes and carries away the same, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one year nor more than ten years, or by both such fine and imprisonment.

POINTS AND ARGUMENT.

There were several exceptions taken by the plaintiff in error during the progress of the case, the first being to the action of the court in overruling the demurrer to counts Nos. 1, 2, and 5 of the indictment, and assignment of error No. 1 is based upon this exception. Assignments of error Nos. 2 and 3 are based upon an exception to the admission of a confession made by Jolly to one Vickery, a post-office inspector, and the admission of certain letters found in Jolly's possession in connection with the said confession; but the plaintiff in error does not rely upon these in his argument, and I shall therefore not discuss them.

The remaining exceptions and assignments of error are all based upon the proposition that the court should have instructed the jury at the conclusion of the testimony to acquit the defendant. The court was asked by counsel for Jolly to so instruct the jury, the request being based upon the ground that the indictment being under section 5456 the evidence in the case tending to prove that Jolly committed a larceny of postage stamps from a post-office of the United States, or from the possession of a postmaster of the United States, as such, did not authorize a conviction, the position taken by Jolly's counsel being, first, that in order to come within the scope and meaning of section 5456 there must have been an actual taking from the person—in other words, a robbery; and, in the second place, that postage stamps are not personal property of the United States within the meaning of that statute, or, as stated by counsel in opening the argument in his brief, "that no indictment can be based on the provisions of section 5456, United States Revised Statutes, for the offense of taking and carrying away postage stamps belonging to the United States; that Congress has provided for the punishment of that offense by another section of the Statutes, namely, section 5453, and that this is the only statute that applies to such offense; that postage stamps are not personal property of the United States, or things of value, but are merely representatives of value, and have been so declared by Congress by section 5413, United States Revised Statutes."

The demurrer, which was overruled as to counts one, two, and five of the indictment, was based upon the same ground, as is disclosed by the brief of the plaintiff in error.

The plaintiff in error confines the argument in his brief to the points above suggested, namely, his exception to the action of the court in overruling the demurrer to the counts in the indictment on which the trial and conviction were had, and to the refusal of the court at the close of the testimony to instruct the jury to find the defendant not guilty, as requested.

The first question for consideration, then, is as to the scope and meaning of section 5456, Revised Statutes, and whether the contention that a proper construction of the said section confines it to the taking of personal property from the person, and not otherwise. As before stated, the section reads:

Every person who robs another of any kind or description of personal property belonging to the United States, or feloniously takes and carries away the same, shall be punished, etc.

The construction placed upon this statute in the brief of the plaintiff in error can not be the true one. Certainly the intention of Congress was not only to punish the unlawful taking of the personal property of the United States from the person of one who had it in possession, but was also to punish the felonious taking and carrying away of such property from the lawful custody of the United States or its agents. If this was not the intention of section 5456, what was the necessity for the alternative clause? When the statute says "Every person who robs another of any kind or description of personal property belonging to the United States," it denounces the felonious taking and carrying away of the property from the person, because robbery is from the

person, and this is a separate and distinct offense under the first clause of the statute. The second clause would then read as follows (omitting the intermediate words which describe the offense under the first clause):

Every person who feloniously takes and carries away the same.

What does the word "same" refer to? Certainly to "*any kind or description of personal property belonging to the United States.*" Then, to complete the statute as it was undoubtedly intended to be construed by Congress, the language of the second clause would be as follows:

Every person who feloniously takes and carries away any kind or description of personal property belonging to the United States shall be punished, etc.

It seems clear, therefore, that the first position of plaintiff in error, that the section under discussion only applies to robbery, can not be maintained.

The next position contended for by the counsel for plaintiff in error in his brief is—

That postage stamps are not personal property of the United States or things of value, but are merely representatives of value, and have been so declared by Congress by section 5413, United States Revised Statutes.

The argument of the counsel is that, in order to bring the offense within section 5456, the essential principles pertaining to larceny at common law must be applied, at least in so far as the article alleged to have been taken is concerned, and upon this ground it is insisted that postage stamps in the custody of the United States or its

agents, before actually sold, are not the subject of larceny. Larceny at common law is defined by Mr. Blackstone as "the felonious taking and carrying away of the personal goods of another," and he says, further, "this felonious taking and carrying away must be of the personal goods of another, for if they are things real, or savor of realty, larceny at common law can not be committed of them." Further, by the same commentator, that "bonds, bills, and notes, which concern mere choses in action, were also at the common law held not to be such goods whereof larceny might be committed, being of no intrinsic value and not importing any property in possession of the person from whom they are taken, but such were made the subject of larceny by statute." (2 Geo. II, chap. 25.)

The point intended to be made here, however, is that Congress, in the statute under consideration, did not intend to restrict the offense within the technical limits of larceny at common law—that is, by what is understood by the term "personal goods or chattels"—but intended to give the statute a much broader scope and to include within its operations, "*personal property of any kind or description belonging to the United States.*" Bank notes, bonds, bills, certificates, representatives of value, etc., are held not to be goods and chattels, but it is nowhere held that such are not personal property in the general signification of the term, and, while it was not larceny at common law to steal bank notes (unissued), bonds, bills, obligations, representatives of value, etc., so charged in a bill of indictment for larceny, it has been decided that an indictment for larceny, even as to these, can be

sustained for stealing the paper on which they are printed, stamped, or written. (1 Wharton's Crim. Law, § 880, p. 769.)

I take the position that stamps deposited in a post-office of the United States for sale and use, or in the possession of a postmaster of the United States for sale and use under the postal laws of the United States, are the subject of larceny at common law. They have been issued by the Government, but have not been sold. They have an intrinsic value to the Government—at least to the extent of the cost, for the materials used in their construction, namely, the paper, the mucilage, and the coloring used in the stamping; all have a recognized market value—and it does not enter into the consideration of the question whether the intrinsic value of the articles stolen is great or small. The same doctrines apply. "To be a subject of larceny, in all cases, the property taken must be of some value, though proof of the slightest degree of usefulness will satisfy this requirement." (A. & E. Encycl. of Law, vol. 12, p. 786; *Wolberton v. Com.*, 75 Va., 909.)

"It as essentially violates a rule necessary to the good order of society to steal a thing of small value as of great, though the crime is not deemed so heavy. Therefore an indictment may be maintained if the thing is of *some worth*, though less than the smallest coin or denomination of money known to the law." (1 Bishop's New Crim. Law, § 224, p. 123, and cases there cited.)

But, as before stated, section 5456 does not restrict the offense described in the said section to technical larceny

at common law, namely, the felonious taking and carrying away of the personal goods and chattels of the United States, but it uses the broad and comprehensive terms, "*any kind or description of personal property.*" Property is *nomen generalissimum*, and "in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects. Standing alone, the term includes everything that is the subject of ownership." (Anderson's Diet. of Law; A. and E. Encycl. of Law, vol. 19, pp. 284, 285.) "Property" includes not only ownership, estates, and interests in corporeal things, but also rights, such as trademarks, copyrights, patents, and rights *in personam* capable of transfer or transmission, such as debts. (See *Birchall v. Pugin*, L. R., 10 C. P., 397; 2 Aust. Juris., 817 *et seq.*) "Property," in a policy of insurance, has been held to include current bank bills owned by the assured. (5 Metcalf Rep., 1.) The term "goods and chattels" includes choses in action. (1 Atk., 182.) The word "property" includes choses in action as well as choses in possession. It includes money due as well as money possessed. (*Carlton v. Carlton*, 72 Me., 116; *Idc v. Hurwood*, 30 Minn., 195.) In *Lilly v. Commissioners*, 69 N. C., 307, it is held that, "A *credit* is property, and, as such, is liable to taxation as any other property." In *Adams v. Jones*, 6 Jones's Eq. (N. C.), 221, it is held that a share of stock in a railroad company is property to be sold under a clause of a will. The word "property" is among the most comprehensive among those in use to signify things which are owned and enjoyed. (*Redmond v. Commissioners*, 106 N. C., 140.)

"Property," in its legal sense, is the exclusive right of possessing, enjoying, and disposing of a thing. (*Chicago, etc., R. Co. v. Englewood, etc., R. Co.*, 115 Ill., 375-385.) Postage stamps belonging to the Government come under the general head of personal property, because the Government has the exclusive right of possessing, enjoying, and disposing of them, and this is true without regard to their intrinsic value.

The term "personal property" includes goods and chattels, but goods and chattels do not include all kinds and descriptions of personal property; so, in this statute, the words "any kind or description of personal property" are sufficiently broad to embrace every article of personalty which can be included under the head of property.

The attention of the court is called particularly to the fact that these postage stamps, charged in the bills to have been taken by Jolly, had been issued by the Government to the postmaster at Hardinsburg, Ky., but were not sold. As to the value of the postage stamps under these conditions, attention is called to the act of July 17, 1862 (12 Stat. L., 592), in which postage stamps are made receivable in payment of dues in sums of less than \$5. Attention is also called to the act of June 12, 1866 (14 Stat. L., p. 60, sec. 12), in which the item of expense in the manufacture of stamps is recognized. The fact that postage stamps are made the subject of an offense in section 5453 shows that they are recognized as property by the United States, at any rate by the legislative branch of the Government.

I therefore differ with the counsel in the position that *postage stamps are not personal property of the United States*. As mere representatives of value, if such they are, and therefore of no intrinsic value, they may not be the subjects of larceny at common law; but most certainly they are property, because they are the subject of ownership and they are personal property as contradistinguished from realty. I maintain that postage stamps are property, that they are personal property, and, while belonging to the United States after they are manufactured and prepared and before sold, come within the meaning and purport of section 5456. In *United States v. Davis*, (5 Mason, 356-365), cited by and relied on by plaintiff in error, Justice Story does not hold that choses in action are not personal property. He says that "Bonds, bills and notes which are choses in action *are not esteemed by the common law goods whereof larceny may be committed*, being of no intrinsic value," etc. This is in line with the position that although choses in action or representatives of value are not included in the term "goods," and as such the subject of larceny at common law, yet they are personal property.

But the plaintiff in error insists that the bill of indictment should have been drafted under section 5453, which reads as follows:

Every person who, without authority from the United States, secretes within, embezzles, or takes and carries away from any building, room, office, apartment, vault, safe, or other place where the same is kept, used, employed, placed, lodged, or deposited by authority of the United States, any

bedpiece, bedplate, roll, plate, die, seal, type, or other tool, implement, or thing used or fitted to be used in stamping or printing, or in making some other tool or implement used or fitted to be used in stamping or printing any kind or description of bond, bill, note, certificate, coupon, postage stamp, revenue stamp, fractional-currency note, or other paper instrument, obligation, device, or document, now or hereafter authorized by law to be printed, stamped, sealed, prepared, issued, uttered, or put in circulation on behalf of the United States, or who, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material prepared and intended to be used in the making of any such papers, instruments, obligations, devices, or documents, or who, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material printed or stamped, in whole or part, and intended to be prepared, issued, or put in circulation on behalf of the United States as one of the papers, instruments, or obligations hereinbefore named, or printed or stamped, in whole or part, in the similitude of any such paper, instrument, or obligation, whether intended to issue or put the same in circulation or not, shall be punished by imprisonment, at hard labor, not more than ten years, or by a fine of not more than five thousand dollars, or both.

Suppose, for the sake of the argument, that the court should hold that postage stamps are not personal property such as contemplated in section 5456. I submit that the two counts of the indictment upon which Jolly was convicted contain sufficient allegations to constitute an offense under section 5453. It is true, as before stated,

that the draftsman of the bill under consideration seemed to have in mind section 5456 when he drafted the first and second counts of the indictment upon which the plaintiff in error was convicted, for, after he concluded each one of these counts, he noted this section. But it is decided in *Williams v. United States*, at this term (168 U. S., 382), that "When an indictment properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the prosecuting representative of the United States may have supposed that the offense charged was covered by a different statute."

It is not necessary to use the exact words of a statute in order to sufficiently charge a statutory crime. The requirements are that the indictment shall state the offense with sufficient certainty, first, to enable the court to see that, if the facts are true, an offense has been committed; second, to enable the court to know what punishment to impose in case of a conviction; third, to enable the court to confine the proof to the offense charged; fourth, to give the defendant reasonable notice of the particular charge which he is called upon to answer, so that the record will show the offense with which the defendant is charged; fifth, to so identify the offense that an acquittal or conviction may be pleaded in bar of a subsequent prosecution for the same offense. (Clark's *Crim. Proc.*, 150; Bishop's *Crim. Proc.*, § 519 *et seq.*; 1 Stark. *Crim. Pl.*, 68.)

Now, let us apply these rules and see if this indictment is not sufficient even under section 5453. For convenience, let us eliminate all of section 5453 except

that which relates to the particular offense with which Jolly is charged. The statute would read this way :

Every person who, without authority from the United States, * * * takes and carries away from any building, room, office, * * * or other place where the same is kept, used, employed, placed, lodged, or deposited by authority of the United States, any * * * postage stamp * * * now or hereafter authorized by law to be printed, stamped, * * * on behalf of the United States, * * * shall be punished by imprisonment at hard labor not more than ten years or by a fine of not more than five thousand dollars, or both.

Now, this bill alleges that Jolly "did feloniously steal, take, and carry away." This allegation is sufficient to charge that it was done without the authority of the United States, for when it is alleged that the taking and carrying away was felonious and by stealth this language implies the absence of authority from the United States to take and carry away the stamps. One material element of larceny is that the property stolen is taken without the consent of the owner, but no bill of indictment charges in so many words that the property is taken without the consent of the owner or the authority of the owner. When a person is charged with the stealing, that sufficiently alleges that the consent of the owner is wanting. Then the taking by Jolly of the postage stamps described in the bill without the authority of the United States is sufficiently charged when the bill alleges that he "did feloniously steal, take, and carry away." This certainly negatives the taking "by authority."

It is further necessary to charge under this section that the taking and carrying away was from a building, room, office, etc., where stamps were kept, used, employed, placed, lodged, or deposited by authority of the United States.

The charge in this indictment, in the first count, is that the stamps were taken from a building used as a post-office building of the United States of America, at Hardinsburg, etc., and, in the second count, that they were taken from the possession of Thomas McClure, who was then and there a postmaster of the United States of America of the post-office at Hardinsburg, etc., and, as such postmaster, then and there had said stamps in his possession when so taken. What more is necessary to state the charge that the stamps were taken from a building, office, or place where they were kept., etc., by authority of the United States? The post-office of the United States is established by law and is by law an office or a place where postage stamps belonging to the United States, before they are issued for actual use to pay postage on mailable matter, are kept. Section 3918, Revised Statutes, is as follows:

Postage stamps and stamped envelopes shall be furnished by the Postmaster-General to all postmasters, and shall be kept for sale at all post-offices; and each postmaster shall be held accountable for all such stamps and envelopes furnished to him.

Not only is the post-office thus constituted a legal repository for postage stamps belonging to the United States, but the postmaster is made a legal custodian of

such stamps. Therefore, when the allegation is contained in the indictment that the stamps stolen by Jolly were taken from a post-office of the United States and from the possession of the postmaster, it sufficiently charges that they were taken from a place, building, office, etc., where they were kept, used, employed, placed, lodged, or deposited by authority of the United States.

The articles alleged to have been feloniously taken and carried away by Everett Jolly were postage stamps of the United States of America amounting to the value of \$163.12, which are particularly described in the bill of indictment as being of the denomination of 2,683 1-cent, 240 2-cent, 191 4-cent, 183 5-cent, 670 10-cent, 100 1-cent postage-due stamps, 175 2-cent postage-due stamps—the same description being given in both the first and second counts. Therefore, here are the three essential elements of the statutory offense under section 5453: First, that the taking was without the authority of the United States, because it was felonious and by stealth; second, that the taking was from a building and from the possession of the postmaster where the stamps were kept, used, employed, lodged, and deposited by authority of the United States; third, the stamps taken are specifically described as postage stamps of the United States of various denominations. These allegations were sufficient to give the court to understand that an offense had been committed. In case of conviction there could be no question in the mind of the court as to the punishment authorized by law. The court could readily confine the evidence in the case to the offense

charged. The defendant was put fully upon notice, not in general terms, but with great particularity, as to the charge against him, and the production of the record in this case would be a complete bar to a subsequent prosecution founded upon the same acts.

JAS. E. BOYD,

Assistant Attorney-General.

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OPINION

JOLLY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF KENTUCKY.

No. 238. Submitted April 28, 1898. — Decided May 9, 1898.

Postage stamps belonging to the United States are personal property, within the meaning of Rev. Stat. § 5456, which enacts that "Every person who robs another of any kind or description of personal property belong-

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ing to the United States, or feloniously takes and carries away the same, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one year nor more than ten years, or by both such fine and imprisonment," and may be made the subject of larceny.

THE case is stated in the opinion.

Mr. Robert S. Todd for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error seeks to reverse his conviction of the crime of stealing certain postage stamps on the 25th day of April, 1894, being the property of the United States, upon which conviction he was sentenced to be imprisoned for the term of two years. The indictment against him was found in the District Court of the United States for the District of Kentucky, Owensborough Division, in the June term, 1895, and contained five counts. It was drawn under section 5456 of the Revised Statutes. The first count alleged, in substance, that on the 25th day of April, 1894, at Hardinsburg, in the district mentioned, the defendant did feloniously steal, take and carry away from a building then and there used as a post office building by the United States, certain postage stamps of the United States, of various denominations mentioned in the indictment, and of the value named (\$163.12), and which stamps were then and there the personal property of the United States of America.

The second count was the same, except that it alleged the stealing to have been from the possession of Thomas McClure, the postmaster, etc.

The third and fourth counts alleged the stamps to have been the property of the Post Office Department, and the fifth count alleged that he had the stamps in his possession with intent to convert to his own use, the same having there-

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tofore been stolen from the United States by some other person, which the defendant well knew.

Upon being arraigned, the defendant filed a demurrer to each count of the indictment, which was sustained as to the third and fourth counts and overruled as to the others.

His counsel upon the trial again raised the question as to the validity of the first and second counts, duly excepting to the decision of the court in holding that he might be convicted upon either of them.

The judge charged the jury that the defendant could not be convicted under the first, second and fifth counts together; that if convicted upon either the first or second count, or both, he could not be convicted under the fifth.

He was found guilty as charged in the first and second counts, but the jury said nothing in their verdict as to the fifth count.

The same objections to the conviction that were taken below are now urged upon us by counsel for the plaintiff in error as grounds for the reversal of the judgment.

Section 5456 of the Revised Statutes, under which the indictment was drawn, reads as follows:

"Every person who robs another of any kind or description of personal property belonging to the United States, or feloniously takes and carries away the same, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one nor more than ten years, or by both such fine and imprisonment."

The contention on the part of the plaintiff in error is, that in order to sustain an indictment under this statute (1) there must be a felonious and forcible taking of personal property; and (2) the property must be the subject of larceny, which postage stamps belonging to the Government are not.

(1) There are two distinct offences mentioned in the statute.

One is the offence of robbery, the legal and technical meaning of which is well known. It is a forcible taking, or a taking by putting the individual robbed, in fear.

There is also set forth in the statute the crime of feloniously taking and carrying away any kind or description of personal

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property belonging to the United States. This is a distinct and separate offence from that of robbery. If the statute required the taking to be forcible in all cases, the language providing against the felonious taking and carrying away of the personal property of the United States would be surplusage, the forcible taking being already implied and included in the use of the word "rob." But in addition to robbery, the offence of feloniously (not forcibly) taking the personal property of the United States is created. The indictment herein comes under the latter head.

(2) The objection that the postage stamps are not the subject of larceny while in the possession and being the property of the United States, we think is also untenable.

The language used in the statute is much broader and covers more ground than the common law definition of larceny, and is also more comprehensive than the statute of 1790. Act of April 30, 1790, c. 9, 1 Stat. 112, 116. "Any kind or description of personal property" is an exceedingly broad designation. It is difficult to imagine language which would be plainer in its meaning, or which would more certainly embrace property such as is the subject of this indictment.

Postage stamps while in the hands of the Government, ready to be sold and used, are most surely its personal property. Although section 5413 provides that the words "obligation or other security of the United States" shall be held to mean, among other things, "stamps and other representatives of value, of whatever denomination, which have been or may be issued under any act of Congress," yet that language does not preclude the stamps from being the personal property of the United States before they are issued and sold by it. The section in question (5413) precedes those sections relating to the forgery or counterfeiting of United States obligations or securities, national bank notes, letters-patent, certificates of entry, public records and the like, and it includes stamps or any obligation of the United States that may be the subject of forgery or counterfeiting, but it does not thereby exclude postage stamps, before they are issued and while in the possession of the Government, from the

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general designation of personal property belonging to the United States.

There is, while the stamps are in the possession of the Government, some intrinsic value in the stamps themselves as representatives of a certain amount of cost of material and labor, both of which have entered into the article in the process of manufacture entirely aside from any prospective value as stamps. They are incapable of being distinguished, the one from the other. All postage stamps of the same denomination are alike, and the moment they are taken from the possession of the Government they are valuable in proportion to their denomination and are subject to use, the same as if they had been purchased, because it is wholly impossible for the Government to detect or identify any particular stamp as having been stolen or otherwise fraudulently put in use. Once out of the possession of the Government they may be used for their full value to obtain carriage by mail of the article to which they are affixed. There is every reason therefore why such stamps should be regarded as personal property even while in the possession of the Government. They become valuable to the amount of their denomination the very instant they get into the possession of another. They are not mere obligations, but a species of valuable property in and of themselves the moment they are out of the possession of the Government.

The case of the *United States v. Davis*, 5 Mason, 356, 362, 365, was an indictment for stealing bank bills, a promissory note, etc., and it was founded upon a different statute in which very different language was used. The act under which that indictment was found was chapter 9 of the laws of 1790, (1 Stat. 112, 116,) and section 16 thereof provided "that if any person . . . shall take and carry away, with intent to steal or purloin, the personal goods of another," etc. It was held by Mr. Justice Story that the meaning of the words "personal goods of another" was to be determined by a resort to the common law as furnishing the proper rule of interpretation, and he held that in the strict sense of the common law "personal goods" are goods which are movable, belong to, or are the

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property of some person, and which have an intrinsic value; that bonds, bills and notes, which are choses in action, are not esteemed by common law goods whereof larceny may be committed, being of no intrinsic value, and not importing any property in the possession of the person from whom they are stolen, but only evidence of property. Therefore, strictly construing the statute as a penal one, the court held that the analogy of the common law in respect to larceny might well furnish the proper rule for decision, and that personal goods in the sense of the act under consideration did not embrace choses in action. Since that statute was passed the common law definition of larceny has been largely extended by statute in almost every State in the Union.

The statute from which section 5456, Revised Statutes, was taken was passed March 2, 1867, c. 193, 14 Stat. 557, and the same all-embracing language is found therein. "Any kind or description of personal property" is the phrase used. It was no doubt passed to enlarge the common law in relation to the subjects of larceny. Although at common law written instruments of any description were not the subject of larceny, as not being personal goods; that is, movables having an intrinsic value, yet although such instruments could not in strictness be stolen, the paper or parchment on which they were written might be, and prosecutions for petty thefts of this description frequently took place in England. *People v. Loomis*, 4 Denio, 380; 3 Chit. C. L. 932; 2 Russ. on Crimes, 74 to 80; *Rex v. Clark*, R. & R. 181; *Vyse's case*, Ry. & Mood. 218; *Reg. v. Morris*, 9 C. & P. 347; *Reg. v. Rodway*, 9 C. & P. 784; *Rex v. Bingley*, 5 Id. 602; *Rex v. Mead*, 4 Id. 535. To make stamps, while unissued and in the hands of the Government, the subject of larceny is not, therefore, any very great departure from the general doctrine of the common law.

Counsel for plaintiff in error claims that the offence, as shown by the evidence in this case, assuming it to be true on the part of the United States, is brought within section 5453 of the Revised Statutes in relation to secreting, embezzling, taking or carrying away any property, etc., stamped in whole or in part, and intended to be issued in behalf of the United

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States, and he also argues that the indictment is wholly defective under that section.

Whether the facts might or might not warrant an indictment under such section, it is not now necessary to decide, for the reason that we hold the indictment good under section 5456, because we regard postage stamps belonging to the United States as being included in the section in question as personal property, and therefore the subject of larceny.

The action of the jury in returning a verdict of guilty upon the first and second counts and being silent as to the fifth was equivalent to a verdict of not guilty as to that count. See cases cited by Mr. Justice White in *Selvester v. United States*, 170 U. S. 262.

For the reasons already given, we think the judgment is right, and that it should be

Affirmed.
